

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 31, 2006 Session

IN RE: M.R.W., T.D.B., and A.N.B.

**Direct Appeal from the Juvenile Court for Davidson County
No. PT-10401; 2119-64142; 2003-02997/02998 Betty K. Adams, Judge**

No. M2005-02329-COA-R3-PT - Filed May 3, 2006

The trial court terminated Mother's parental rights based on abandonment, substantial non-compliance with a permanency plan, and persistence of conditions leading to removal. Mother appeals, asserting the trial court erred by failing to make findings of fact regarding each ground for termination asserted by the Department of Children's Service and by failing to enter its order within thirty days of the trial of the matter as required by Tennessee Code Annotated § 36-1-113(k). We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY M. KIRBY, J., joined.

Thomas H. Miller, Franklin, Tennessee, for the Appellant, M.D.B.

Paul G. Summers, Attorney General and Reporter and Sharon G. Hutchins, Assistant Attorney General, for the State of Tennessee Department of Children's Services.

OPINION

This appeal arises from an August 31, 2005, order of the Juvenile Court of Davidson County terminating Mother's parental rights to her three minor children. In February 2005, the Department of Children's Services ("DCS") filed a petition to terminate Mother's parental rights based on abandonment under Tennessee Code Annotated § 36-1-113(g)(1) as defined by § 36-1-102(I) and (iv); § 36-1-113(g)(2) (substantial noncompliance with permanency plan), and § 36-1-113(g)(3) (persistence of conditions following removal of the child for a period of six months). The court heard the matter on June 20, 2005. On August 15, 2004, fifty-six days after the conclusion of the trial, Mother's counsel filed a motion to enter order pursuant to Tennessee Code Annotated § 36-1-113(k). At the request of DCS, Mother's counsel moved for a one-week continuance of the hearing of the motion, and the motion was continued until August 30. On August 31, the trial court entered

its order terminating Mother's parental rights. The trial court based its order upon finding, by clear and convincing evidence, grounds for termination based on Tennessee Code Annotated §§ 36-1-113(g)(1), 36-1-113(g)(2), and 36-1-113(g)(3), and upon further finding that termination was in the best interests of the children. Mother filed a timely notice of appeal to this Court on September 30, 2005. We affirm.

Issues Presented

Mother presents two issues for our review:

- (1) Whether the case should be vacated and remanded due to the trial court's failure to enter an order within thirty days of the conclusion of the trial.
- (2) Whether the case should be vacated and remanded due to the trial court's failure to make specific findings of fact and conclusions of law on each ground alleged.

Standard of Review

The issues raised on appeal in this case are issues of law. Our review of the trial court's conclusions on matters of law is *de novo* with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).

Analysis

We first address Mother's assertion that the trial court's order should be vacated where it failed to comply with Tennessee Code Annotated § 36-1-113(k), which provides:

The court shall enter an order that makes specific findings of fact and conclusions of law within thirty (30) days of the conclusion of the hearing.

Tenn. Code Ann. § 36-1-113(k)(2005). Mother's argument, as we perceive it, is that, although the statute supplies no remedy where the court fails to enter an order within thirty days of the hearing, the courts should construe the legislature's use of "shall" in the section as mandatory.

We note that this statutory interpretation issue was not raised in the court below. Although Mother filed a motion moving the trial court to enter an order, Mother did not move the court to dismiss the matter based on the court's failure to comply with the section. In general, issues may not be raised for the first time on appeal. *Cantrell v. Walker Die Casting, Inc.*, 121 S.W.3d 391, 396 (Tenn.Ct.App.2003).

In this case, however, Mother contends that the trial court's order must be vacated where it entered its order more than fifty days after the conclusion of the hearing of the matter in violation

of § 36-1-113(k). Thus the issue raised in this appeal, as we perceive and rephrase it, relates to whether the trial court had subject matter jurisdiction to enter its order after the thirty-day period prescribed in § 36-1-113(k) had expired.¹ Subject matter jurisdiction cannot be waived. Subject matter jurisdiction “relates to the right of the court to adjudicate, or to make an award through the remedies provided by law upon facts proved or admitted in favor of, or against, persons who are brought before the court under sanction of law.” 17 Tennessee Jurisprudence Jurisdiction § 2 (1994). It concerns the authority of a court to hear a controversy. *Meighan v. U.S. Sprint Commc’ns*, 924 S.W.2d 632, 639 (Tenn.1996). If a court acts without subject matter jurisdiction, its orders are void. *Riden v. Snider*, 832 S.W.2d 341, 343 (Tenn. Ct. App. 1991). Such orders are a nullity and may be collaterally attacked. *County of Shelby v. City of Memphis*, 211 Tenn. 410, 365 S.W.2d 291, 292 (Tenn.1963).

In order to determine whether the trial court lost subject matter jurisdiction when it failed to enter its order making findings of fact and conclusions of law within thirty days of the hearing, we must determine whether “shall” as used in the statutory section is mandatory. When interpreting a statute, the court is to “ascertain and give effect to the legislative intent without unduly restricting or expanding the statute’s coverage beyond its intended scope.” *Hathaway v. First Family Fin. Servs., Inc.*, 1 S.W.3d 634, 640 (Tenn.1999) (citations omitted). We must ascertain the intent of the legislature from the natural and ordinary meaning of the statutory language and in context of the entire statute, without forcing a construction that would limit or expand its scope. *JJ & TK Corp. v. Bd. of Comm’rs*, 149 S.W.3d 628, 630-31 (Tenn. Ct. App. 2004) (citations omitted).

Although the General Assembly’s use of “shall” generally is construed as being mandatory as opposed to discretionary, statutory provisions concerning the time frame in which an act must be done ordinarily are considered to be directory. *Kardoush, L.L.C. v. City of Memphis Alcohol Comm’n*, No. W2005-00104-COA-R3-CV, 2005 WL 3017602, at *3 (Tenn. Ct. App. Nov. 9, 2005) (*no perm. app. filed*) (citing *JJ & TK Corp.*, 149 S.W.3d at 631; *Garrett v. State*, 717 S.W.2d 290, 291 (Tenn.1986)). In *Garrett v. State*, the Tennessee Supreme Court considered the use of “shall” in Tennessee Code Annotated § 4-5-314(g)(1985) within the context of the forfeiture of property to the state. Section 4-5-314(g) provided:

A final order rendered pursuant to subsection (a) or initial order rendered pursuant to subsection (b) shall be entered within ninety (90) days from the date of the hearing at which the petition for enforcement of the order was filed, and the order shall be entered within thirty (30) days from the date of the hearing at which the petition for enforcement of the order was filed, unless such period is waived or extended with the written consent of all parties or for good cause shown.

Garrett, 717 S.W.2d at 291. Although the administrative law judge in that case failed to render an initial order upholding the forfeiture of property until 112 days after the hearing, the *Garrett* court

¹See *Kardoush, L.L.C. v. City of Memphis Alcohol Comm’n*, No. W2005-00104-COA-R3-CV, 2005 WL 3017602 (Tenn. Ct. App. Nov. 9, 2005) (*no perm. app. filed*) (noting that the sixty-day period prescribed in Tennessee Code Annotated § 57-3-208(e) related to Alcohol Commission’s authority to act on petitioner’s application).

held that the word “shall” in the statute was directory and that the administrative law judge’s error was harmless. *Id.* The *Garrett* court additionally noted that the legislative intent behind the ninety-day limit in § 4-5-314 was not clear. *Id.*

By contrast, in *Kardoush v. City of Memphis Alcohol Commission*, we held “shall” as used in § 57-3-208(e) was mandatory. In *Kardoush*, we considered whether the Memphis Alcohol Commission lacked subject matter jurisdiction to act on an application for a license after the sixty-day period prescribed in Tennessee Code Annotated § 57-3-208(e) had passed. The statutory section in that case provided, in pertinent part:

(e) A failure on the part of the issuing authority to grant or deny the certificate within sixty (60) days of the written application for such shall be deemed a granting of the certificate.

(f) The requirement imposed by this section to submit a certificate shall not be applicable to any applicant if:

(1) The authority of the county or municipality charged with the responsibility to issue the certificate required herein shall have failed to grant or deny the certificate within sixty (60) days after written application for such certificate is filed[.]

Tennessee Code Annotated § 57-3-208(e)(f)(2002); *Kardoush*, 2005 WL 3017602, at * 3. In *Kardoush*, we noted that the General Assembly clearly intended “shall” to be mandatory where, unlike the statutory section considered in *Garrett*, § 57-3-208 provided a remedy when the Commission failed to act within the sixty-day statutorily prescribed period.² *Id.* at *4. We held in *Kardoush* that the Commission lost the authority to act after the sixty-day period had passed, and that its order was, therefore, a nullity. *Id.*

Although we agree with Mother that § 36-1-113(k) evidences the General Assembly’s mandate that parental termination cases be adjudicated as expeditiously as possible, we disagree that the trial court’s failure to enter its order within thirty days requires that its order be vacated. The trial court’s failure to comply with the section insofar as it requires the trial court to make written findings of fact and conclusions of law generally results in remand of the matter on appeal. *See White v. Moody*, 171 S.W.3d 187 (Tenn. Ct. App. 2004). It does not result in loss of jurisdiction by the trial court. *See id.* Rather, in those cases, the matter is remanded for the trial court to make written findings of fact and conclusions of law that then may be reviewed by the appellate courts. *See id.*

Likewise, the trial court’s failure to comply with the portion of the section that directs it to enter an order within thirty days of the hearing does not divest the trial court of its jurisdiction.

²In *Kardoush*, we observed that, although the statute considered by the *Garrett* court, § 4-5-314(g), utilized “shall,” it prescribed no consequence if the court failed to adhere to the ninety-day period. It simply directed the court to act within ninety days. *Kardoush*, 2005 WL 3017602, at * 3.

Moreover, in the case now before us, where the trial court has made definite and detailed findings of fact and conclusions of law, remand on appeal as requested by Mother would serve no purpose. However, we again emphasize the urgency of parental termination actions and urge the trial courts to enter their final orders, including written findings of fact and conclusions of law, within the thirty-day period prescribed by 36-1-113(k).

We next consider Mother's argument that the trial court's order should be vacated and this matter remanded because the trial court failed to make findings of fact regarding each statutory ground alleged in DCS's petition to terminate her parental rights. In her brief to this Court, Mother does not refute the court's findings of fact and conclusions of law with respect to the several grounds on which the trial court based its order terminating her rights. Rather, Mother contends the trial court's order regarding the ground of abandonment under § 36-1-113(g)(1) is silent regarding abandonment as defined by § 36-1-102(1)(A)(I) (willful failure to visit or support), a ground asserted by DCS, although the trial court determined Mother had abandoned her children as defined by § 36-1-102(1)(A)(iv). Mother's argument, as we understand it, is that, although the trial court found, by clear and convincing evidence, the existence of at least three statutory grounds for termination of her parental rights, and although she does not appeal the court's findings and conclusions with respect to those grounds, the matter should nevertheless be remanded for findings regarding a fourth ground.

We find this argument to be somewhat disingenuous. In her brief, Mother emphasizes the need for timely adjudication of parental termination matters in the best interests of the children on one hand. On the other, she contends this matter should be remanded for findings regarding a fourth ground alleged by DCS despite apparently conceding, or at least not appealing, the trial court's termination of her rights based on three alternate grounds. Nevertheless, even assuming, without holding, that the trial court erred by failing to address each ground alleged by DCS, such error would be harmless in this case.

Holding

In light of the foregoing, the judgment of the trial court is affirmed. Costs of this appeal are taxed to the Appellant, M.D.B.

DAVID R. FARMER, JUDGE